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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

NO. 71-91

UNDERWRITERS AT LLOYDS LONDON,
ANDREW WEIR INSURANCE CO., LTD.,
FINE ART & GENERAL INSURANCE CO., LTD.,
NATIONAL PROVINCIAL INSURANCE CO., LTD.,
ORION INSURANCE COMPANY, LTD.,
ENGLISH & AMERICAN INSURANCE CO., LTD., "M",
and ECONOMIC INSURANCE COMPANY, LTD.,
"M" a/c,

Petitioners

versus

ALCOA STEAMSHIP COMPANY, INC., ET AL.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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NO.

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ALCOA STEAMSHIP COMPANY, INC., ET AL.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Now come Underwriters at Lloyds London, Andrew Weir Insurance Co., Ltd., Fine Art & General Insurance Co., Ltd., National Provincial Insurance Co., Ltd., Orion Insurance Company, Ltd., English & American Insurance Co., Ltd., "M", and Economic Insurance Company, Ltd., "M" a/c, Petitioners, hereinafter collectively referred to as Excess Underwriters, and respectfully petition this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for

the Fifth Circuit entered in this case on April 26, 1971 exonerating petitioners from liability on the principal of the shipowner's claim for damages but holding petitioners for the payment of interest, and the order of the same Court denying a rehearing entered on June 23, 1971.

OPINION BELOW

The said opinion in question of the Court of Appeals for the Fifth Circuit is reported at ..... F.2d ....., Appendix A, and the order of that Court denying a rehearing was rendered on June 23, 1971, Appendix C. The trial court, United States District Court for the Eastern District of Louisiana, New Orleans Division, rendered its opinion at .....F.Supp. ....., Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1971 Appendix B and a petition for rehearing was timely filed by these petitioners and the order denying the rehearing was entered on June 23, 1971.

The jurisdiction of this Court is invoked under 28 US Code 1254(1).

QUESTIONS PRESENTED

1. Whether the discretion of the district court in assessing the payment of interest against Primary Underwriters who paid $300,000.00 principal, found to be due by both District Court and the Court of Appeals, should be disturbed by the Court of Appeals which shifted the liability for the payment of interest from Primary Underwriters to Excess Underwriters.

2. Whether the nature of interest, being a premium for the use of money, should be due only by the principal debtor who enjoyed the use of the money or by Excess Underwriters.

3. Whether interest can be separable from principal in the absence of contract.

STATUTES INVOLVED

28 U.S. Code 1961, and Louisiana Civil Code of 1970 Article 1935, Appendix E, imposing respectively, interest at the rate allowed by state law, and the state law provision that interest is damages due for the delay in performance of an obligation by primary underwriter to pay money.

STATEMENT OF THE CASE

This litigation has previously come before this Court on application for writ of certiorari filed by Alcoa Steamship Company, which this Court denied, 393 US 836, 21 L.Ed. 2d 107 (1968) The shipowner Alcoa sued the repairman for damages approximating $1,000,000. The ship repair contract contained a red letter clause limiting liability to $300,000. So in this matter two decisions of the Court of Appeals have now held that the red letter clause limiting liability of a ship repairer to $300,000 is valid, 383 F.2d 46, and _____F.2d_____, and exonorated Excess Underwriters from any liability to pay any amount whatever toward interest. From the first determination by the Court of Appeals this Horoiable Court denied certiorari and has accordingly refused to review the correctness of the Fifth Circuit's holding the red letter clause valid.

In its second opinion the Court of Appeals declared that although the primary underwriters of Charles Ferrand & Co., Inc., the ship repairer, elected to pay the principal sum of $300,000, that petitioners, being excess underwriters, pay nothing in the form of principal. However, the Court of Appeals has assessed the interest on $300,000 against Excess Underwriters who are the petitioners in this petition for certiorari.

This petition therefore concerns only the question of the imposition of interest against a litigant who has been exonorated from paying any principal.

It is the position of petitioners that the judgment of the Court of Appeals is erroneous in the three respects above set forth and as such contradicts the holdings of this Court in its previous decisions which we shall cite.

ARGUMENT

I. THE DISCRETION OF THE DISTRICT COURT IN ASSESSING AGAINST PRIMARY UNDERWRITERS THE PAYMENT OF INTEREST SHOULD NOT HAVE BEEN DISTURBED BY THE COURT OF APPEALS.

We have here presented the anamolous situation where Primary Underwriters are held liable for the payment of the principal of $300,000, but the payment of interest on this principal has been cast by the Court of Appeals upon Excess Underwriters held by all Courts to be exonerated of any principal whatever, and reversed the District Court in that regard. Our research discloses no reported decision where a similar holding has been made.

This is an admiralty proceeding and as such the imposition of interest is within the sound discretion of the District Court. Unless the determination of the District Court is arbitrary, discriminatory or illegal, the exercise of such discretion should not be disturbed. There is no finding by the Court of Appeals that the District Court was arbitrary, discriminatory or illegal.

The following United States Supreme Court cases enumerate this principle and are as follows:

Charter Shipping Company vs Bowring, 281 U.S. 515, 74 L.Ed. 1008 (1930), involved a libel in admiralty brought by one British corporation against another to recover a general average deposit. The respondent subsequently filed a suit in England which involved the same subject matter. The District Court dismissed the libel stating that contribution for general average is to be determined by the law of the port of discharge and that "under all the circumstances" jurisdiction should be declined. The Court of Appeals reversed, holding that jurisdiction should have been retained. The Supreme Court, on certiorari, stated that the retention of a suit in admiralty between foreigners is within the discretion of the District Court, and that the exercise of its discretion may not be disturbed unless abused. The Court went on to enunciate the following principle:

> "Even if we assume, as did the Court of Appeals below, that the bills of lading may have modified the liability in general average so as to put in issue the case taken to make the vessel seaworthy before sailing, we cannot say that the District Court inprovidently exercised its discretion. It was for the District Court to consider

> the facts appearing and the inferences which might be drawn from them breach its own conclusion. . . ."

Therefore, on this pertinent issue, the Supreme Court of the United States reversed the Court of Appeals' decision and reinstated the decision based upon the District Court's discretion.

Fairmount Glass Works vs Cub Fork Coal Company, 287 U.S. 474, 77 L.Ed. 439 (1932), involved an action for damages based upon an alleged breach of contract. Jurisdiction of the Federal Court was invoked on diversity of citizenship. On two trials in the Federal District Court the jury returned a verdict in favor of the defendant and requests for new trials were denied by the district judge. The Court of Appeals reversed these judgments and ordered new trials. On certiorari, the United States Supreme Court reversed the Circuit Court's rulings and used the following pertinent language:

> "The rule that this court will not review the action of a Federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court"

Furthermore, the court went on to state:

> "It is urged that the refusal to set aside the

verdict was an abuse of the trial court's discretion, and hence reviewable. The Court of Appeals has not declared that the trial judge abused his discretion. Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion. This court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate, and the circuit courts of appeals have generally followed a similar policy. Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion we have no occasion to determine."

United States vs Socony-Vacuum Oil Co., 60 Sup.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129 (1940), involved a jury conviction under an indictment charging violations of the Sherman anti-trust act. The Court of Appeals reversed and remanded for a new trial. On certiorari, the United States Supreme Court upheld the District Court's exercise of discretion by using the following language:

"Hence, this case falls into the well established rule that neither this court nor the circuit court of appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. Certain exceptions have been noted, such as instances where the trial court has erroneously excluded from consideration matters which were appropriate to a decision on the motion. But there are no such circumstances here. Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be sub-

> ject to review. In substance no more than that is involved here."

In *Brotherhood of Railroad Trainmen vs Baltimore and Ohio Railroad Company*, 331 U.S. 519, 91 L.Ed. 1646 (1947), another case involving the principle of discretion, the issue dealt with the intervention rights of representatives of railroad employees in a suit brought against the railroad. The plaintiffs contended that they had an unconditional right to intervene by virtue of the Interstate Commerce Act. The District Court denied the order and the plaintiffs appealed. The United States Supreme Court stated:

> "Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute the order is appealable and we may judge it on tis merits. But if the matter is one within the discretion of the trial court and if there is no abuse or discretion, the order is not appealable and we lack power to review it."

The court held that the plaintiffs did have a right to intervene based upon the statute and thus, reversed the trial court's ruling. However, the Supreme Court of the United States did state that if the matter in question is one within the discretion of the trial court and there is no abuse or discretion, even the Supreme Court would lack power to review it.

The above decisions concerning the matters within the trial court's discretion and the non-reviewability of the exercise of this discretoin also appear to be the rule in admiralty concerning the award of interest. *The Scotland*, 118 U.S. 507, 30 L.Ed. 153 (1885). This rationale was

adhered to by the Supreme Court in *The AlbertDumois*, 177 U.S. 240, 20 S.Ct. 595, 44 L.Ed. 751 (1900). This collision case involved limitation of liability problems as well as a question as to the award of interest. The Federal Court for the Eastern District of Louisiana valued the cargo at $11,000. However, the Fifth Circuit reversed and put a $15,000 evaluation on the ship. Interest must also have been sought for the increased value, for when the case got to the Supreme Court, the Supreme Court stated the following:

> "There was no error in refusing to allow interest upon her evaluation. The allowance of interest in Admiralty cases is discretionary and not reviewable in this court except in a very clear case."

The next case in which the discretion of the court in allowing interest was at issue, was that of *The Stjerneborg*, 106 Fed.2d 896 (9th Cir., 1939). From a decree in favor of the appellee with interest, an appeal was taken. The appellants argued that in admiralty interest may be properly disallowed or reduced because of unusual delay in the prosecution of an admiralty cause. On rejecting their contention, the Court stated that the allowance of interest is dsicretionary. *The Albert Dumois*, supra. In the absence of anything in the record disclosing who may be blamed for the delay, we are not warranted in holding that the tiral court abused its discretion.

Two other admiralty cases from the Second Circuit which also involved the issue of awarding interest are *Lekas & Drivas, Inc. vs Goulandris*, 306 F.2d 426 (2nd Cir, 1962) and *Van Nievelt, Goudriaan Co.'s Stoom.M. vs Cargo & T. Man Corp.*, 421 F.2d 1183 (2nd Cir, 1970). In the *Lekas* case the Court refused to disturb the District

Court's award of interest, adding, however, that the discretion of the District Court in allowing interest is reviewable for abuse, citing *The Wright*, 109 F.2d 699, 702, 2nd Cir., 1940.

In the *Van Nievelt* case, where pre-judgment interest on a liquidated amount was at issue, the Circuit Court reversed the District Court's denial of interest and remanded the case for an award of interest. In reaching the result, the Court stated that the general rule of allowing interest is much stronger where, as in the instant case, the damages are liquidated and are based upon a breach of contract. The Court also stated that while the general rule is that an admiralty court has discertion to award or deny prejudgment interest, this discretion is not unlimited.

The Court of Appeals in the instant case therefore had no power to disturb the District Court's exercise of discretion. This holding by the Court of Appeals was arbitrary to say the least.

The District Court appointed a Special Master who returned his findings to the Court to the effect that interest should be paid by the Primary Underwriters, Appendix D, declaring that Primary Underwriters having had the benefit of the principal over the years, should now pay interest on that principal. The District Court affirmed that Special Master, Appendix C. The Court of Appeals then upset the finding of the Special Master and the District Court without determining that the Special Master had abused his discretion or that his report was arbitrary or discriminatory. Indeed the Court of Appeals gave as its reason for imposing interest on Excess Under-

writers its language on page 10 of its opinion:

> "We think primary underwriters have the better of it so we fixed the liability on excess underwriters."

We respectfully submit that it has always been the law that unless the District Court has abused its discretion or its holding has been found arbitrary and discriminatory, its determination should remain undisturbed.

II. THE PAYMENT OF INTEREST SHOULD BE ASSESSED ONLY AGAINST THE PRINCIPAL DEBTOR, AND NOT AGAINST ONE WHO WAS EXONERATED FROM THE PAYMENT OF PRINCIPAL.

There is no question but that Primary Underwriters, who paid $300,000 principal on May 5, 1969 retained the full benefit of the use of those funds since October 6, 1956. The determination by the Court of Appeals obviously places a premium on the ability of Primary Underwriters to hold out on the principal (which they ultimately paid voluntarily) for the longest possible period during which time they reaped the harvest of the revenue from the investment, approaching in this situation the sum of $200,000.

Interest is allowed as damages against a debtor for the nonpayment of money by him, and in this case the only underwriters determined to owe money are the Primary Underwriters. If Primary Underwriters had paid the pincipal of $300,000 at the time Alcoa filed suit in 1957, there would be no interest due by anyone. The

voluntary payment by Primary Underwriters of $300,000 on May 5, 1969 terminated the payment of interest.

There are three decisions by the Supreme Court of the United States which bear on the subject. In 1857 *Hemmenway vs Fisher*, 20 Howard 255, 15 L.Ed. 799, probably the first instance of a declaration by the Supreme Court of the United States on the subject of interest in admiralty cases, involved an appeal from the District of Massachusetts concerning a collision which occurred in Louisiana. There the Supreme Court recognized that there was no rule fixing any certain rate of interest upon decrees in admiralty.

The second case which came before the Supreme Court of the United States was *The Scotland*, supra, in which the District Court in an admiralty proceeding was recognized as having the full authority to exercise jurisdiction on the subject of interest. And the following year to the same effect the Supreme Court decided *The Manitoba*, 122 U.S. 97, 30 L.Ed. 1095 (1886). Hence, the District Court's exercise of discretion has been well recognized should not be disturbed here.

The State law of Louisiana controls on the subject of interest and is stated in Civil Code Article 1935 which reads as follows:

> "The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss and whatever loss he may have suffered he can recover no more."

From this language Louisiana has established the rule

which is also recognized in other states that interest is the damage due by a debtor for nonpayment of money. Here the failure to pay the money prior to the time of actual payment was on the Primary Underwriters.

Interest has been defined as a premium paid for the use of money usually reckoned as a percentage. "Interest" is a premium paid for the use of money. *Barker Asphalt Pav. Co. v. Webster County*, 121 N.W. 1072, 1073, 143 Iowa, 255. The word "interest" means premium paid for use of money usually recognized as a percentage. *Kenny v. Los Feliz Inv. Co.*, Cal., 9 P.2d 225, 228, 121 Cal.App. 378. Webster defines "interest" as a premium paid for the use of money, usually reckoned as a percentage, *Hagan v. Commissioners' Court of Limstone County*, 49 So.417, 421, 160 Ala. 544, 37 L.R.A., N.S., 1027. "Interest" is a premium allowed by law for the use of money. *MacRackan v Bank of Columbus*, 80 S.E. 184, 185, 164 N.C. 24, 49 L.R.A., N.S., 1043, Ann. Cas. 1915D, 105; *Gaar v. Louisville Banking Co.*, 74 Ky. (11 Bush) 180, 189, 21 Am. Rep. 209.

Further, interest has been defined as compensation for the use of money. *Arizona Eastern R. Co. v. Head*, 224 P. 1057, 1058, 26 Ariz. 259; *R.F.C. v. Service Pipe Line Co.*, C.A. Okl., 206 F.2d 814, 817. "Interest" is compensation for use of forbearance of money, *Mayflower Inv. Co. v. C.I.R.*, C.A., 239 F.2d 624, 625. "Interest" is the compensation fixed by agreement or allowed by law, for the use or detention of moneys. *Inhabitants of Town of Norridgewock v. Inhabitants of Town of Hebron, Me.*, 128 A. 2d 215, 217.

We respectfully submit that from all considerations,

legal as well as equitable, it was an error for the Court of Appeals to impose the payment of interest upon Excess Underwriters which never had any benefit from any use of the principal sum of money of $300,000, which principal was due only and paid only by Primary Underwriters.

The holding of the Court of Appeals therefore violates the due process clause of the Fifth Amendment and should be reversed because it imposes liability on petitioners who owed no principal and without any authority in law.

III. INTEREST NOT SEPARABLE FROM PRINCIPAL IN THE ABSENCE OF CONTRACT.

The authorities support the proposition that although the principal can exist without interest, a claim for interest cannot exist without the principal in the absence of agreement to that effect in the same fashion that a foundation can exist without the superstructure but the superstructure cannot exist without the foundation.

In *Merrigan v. Metropolitan Life Ins. Co.*, 43 F.Supp. 209 (1942), in an action on a life insurance policy, the Eastern District of Louisiana stated that interest is a matter of law and under Article 1935 of the Louisiana Civil Code is damages for nonpayment of money. The Court said:

> "Interest is ever *interest*; because of its very nature *it is a penalty*, and referring to it as such, makes it none the less *interest*."

The Court further observed:

> "Interest can not be sued for distinctly from

the principal, for it is an accessory to the debt." citing *Succession of Mann*, 4 La. Ann. 28 (1849).

In the particularly pertinent decision by the Eighth Circuit in *Wagner Electric Corporation v. Ocean Acc. & Guarantee Corp.*, 36 F.2d 186 (1929), the insurance company issued an accident policy in the form of an excess policy after $5,000, together with certain incidental charges but was silent on interest. Appellant therefore carried its own insurance up to $5,000 and the appellee insurance company was to carry all thereafter up to the next $5,000. The insurance company paid its $5,000 for the excess but declined to pay the interest and tendered $5,000 in full settlement which was refused. The Court held that the insurance company was not liable for the interest and declared:

> "***Ordinarily, and in the absence of express provision, an insurance company is not liable for interest which has accrued pending appeal, for the reason that: 'Interest is a consideration paid for the use of money, or for forbearance in demanding it when due; and so long as one retains money and has its use he can make no charge against another for interest thereon.' Maryland Casualty Co. of Baltimore, Md., v. Omaha Electric Light & Power Co. (C.C.A. 8) 157 F. 514, 515."

The Special Master here declared, R. 223:

> "The reason for making a determination that the Marine Office of America should bear the responsibility is that it, as primary insurer, had the use of the money during the period of limitation. There is some conflict of opinion as to this question, but I am basing my decision on *Maryland Casualty Company, v. Omaha Electric*

Light and Power Co. CCA 8 (1907), 157 F. 514.

In this case the Court said:

> " 'The argument of plaintiff's counsel that the defendant, by exercising its right of appeal, and by superseding the execution of the judgment pending that appeal, caused the accumulation of interest in question, and thereby created an additional charge against the plaintiff for which it should be held responsible as a loss to the plaintiff, is more specious than sound. The fallacy rests in a failure to recognize the advantage which the appeal gave the plaintiff. * * *
>
> The value of the use is equal to the accrued interest, that being only a consideration paid for the use of money or for forbearance is demanding it when due. Accordingly the assured lost nothing by the delay occasioned by the appeal or by paying the interest which accumulated pending the appeal. The assured stood after paying the interest exactly as it would have stood if it had paid the judgment of $5,000 on January 3, 1902, when originally rendered. Nothing was lost by the appeal, as the interest ultimately paid was neutralzed by the use and enjoyment of the money before that time.' "

Here, as in the *Wagner Electric* supra and *Maryland Casualty Co. of Baltimore, Md. v. Omaha Electric Light & Power Co.*, 157 F. 514, a decision by the Eighth Circuit, so long as one retains money and has its use he can make no charge against another for interest thereon. The Fifth Circuit decision here therefore conflicts with the holding of the Eighth Circuit in *Wagner Electric*, supra.

We respectfully submit that the foregoing authorities establish a rule of law which the Fifth Circuit Court has violated, namely, that interest should be paid only by the party who retains the principal and enjoys the use of it, and not by anyone who has not enjoyed the use of such money. Interest being a penalty it is logically and legally improper to force an innocent party to pay a penalty on the debt of another who has retained the use of the principal for over a decade.

In charging interest against Excess Underwriters, the Fifth Circuit Court has, in effect, granted a decree against excess underwriters which did not exist before. The Court of Appeals has departed from the original concept of interest which is the payment of damages for the use of money. Since Excess Underwriters never had the use of any of the funds, how then can they be charged with interest, which is damages for nonpayment of money? Excess Underwriters were never in all of this proceeding charged with one penny of principal. This being so, it is very difficult for one to understand how they can be charged with any interest on the principal due by Primary Underwriters.

The Court of Appeals has placed much emphasis on the term "aggregate liability" as used in the red letter clause, Appendix A, p. 26. This term "aggregate liability" obviously refers to all individual items of principal taken in the aggregate as of the date when the obligation to pay the principal accrued. Here the obligation to pay the principal accrued from the time the cause of action arose and the cause of action as finally determined by this Court was restricted to $300,000, all principal paid by Primary Underwriters.

CONCLUSION

We respectfully submit that each of the three points above-mentioned is strong reason for this Court to grant this petition for certiorari. We certainly have a matter of first impression, and which violates the cited decisions of this Court and further denies Excess Underwriters of their constitutional right to due process of law under the Fifth Amendment.

Respectfully submitted,

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CERTIFICATE

I, PAUL A. NALTY, a member of the Bar of this Court, do hereby certify that I have this day served copy of the above and foregoing application to Benjamin Y. Yancey and Edward S. Bagley, attorneys for Alcoa, and upon George B. Matthews, attorney for Primary Underwriters, by mailing a copy thereof, postage prepaid, to them at their offices, at New Orleans, Louisiana on this 16th day of July, 1971.

(Sgd.) PAUL A. NALTY

APPENDIX A

The Opinion of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28944

ALCOA STEAMSHIP COMPANY, INC.,
Plaintiff-Appellee Cross Appellant,

versus

CHARLES FERRAN & CO., INC. AND GLENS FALLS INSURANCE COMPANY, ET AL,

Defendants-Appellants Cross Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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(April 26, 1971)

Before BROWN, Chief Judge, GEWIN and THORNBERRY, Circuit Judges.

BROWN, Chief Judge: Now on its second voyage

here[1] the case presents a rehash of the Louisiana Direct Action and Red Letter Clause problem, one concerning interest on the limited liabilty figure, an intramural controversy between the Shiprepairer's[2] primary and excess underwriters as to interest, and a tag end complaint by Shipowner[3] with respect to the amount of interest which has accumulated in one year between the date of the casualty and the first judicial demand. We affirm in part and reverse in part.

After remand following Op [iii] the parties never got around to proving Shipowner's total damages or the reduction thereof under the doctrine of avoidable consequences. About the time it seemed likely that the Special Master and District Court would adhere to our holding in Op [iii] p. 56, that the Red Letter Clause[4]

---

[1]The prior opinions here and in the District Court appear in this sequence: [i] Alcoa Steamship Company, Inc. v. Charles Ferran & Company, Inc., E.D. La., 1965, 242 F.Supp. 962; [ii] Alcoa Steamship Company, Inc. v. Charles Ferran & Company, Inc., E.D. La. 1966, 251 F.Supp. 823, 1966 A.M.C. 1029, *aff'd* in [iii] Alcoa Steamship Company, Inc. v. Charles Ferran & Company, Inc., 5 Cir., 1967, 383 F.2d 46, 1967 A.M.C. 2578, *cert. denied*, 393 836, ... S.Ct. ..... L.Ed.2d ..... . For convenience these prior opinions will be referred to Op [i] [ii] [iii], with page citations following e.g., Op [i] p. 962.

[2]Charles Ferran Company, Inc.

[3]Alcoa Steamship Company, Inc.

[4]The pertinent part of this clause is:

> "* * * we undertake to perform work on vessels * * * only upon condition that we shall not be liable in respect to any one vessel, directly or indirectly in contract [or in] tort * * * to its owners, charterers or underwriters for any injury to such vessel, its cargo, equipment or movable stores, or for any consequences thereof, unless such injury is caused by our negligence or the negligence of our employees and in no event shall our aggregate liability to all such parties in interest for damage sustained by them, as a result of such injury, exceed the sum of $300,000.00. "In connection with the accident and/or indemnity and/or insurance clauses, if any, contained in your specifications, relating to liability for personal injuries, please note that we do not agree to same, in so far as they undertake to impose any liability or any obligation to take out or maintain insurance beyond the liabilities or the obligations to to insure imposed upon us by law."

limitation of $300,000 extended to the underwriters under the Louisiana Direct Action Statute,[5] the Primary Underwriter (Glens Falls) threw in the towel by paying the full $300,000 into the Registry. The Master entered (and the District Court approved) an order limiting liability of Shiprepairer and its Underwriters to $300,000, but he allowed interest against Shiprepairer

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5 "No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors mentioned in the Revised Civil Code Article 2315, or heirs against the insurer. The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brougt against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State. It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all insured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy."
LRS-R.S. 22:655 (Supp. 1962).

and its Primary Underwriter on that sum, from the date of judicial demand (October 1957), rather than the date of the loss (October 1956). Shipowner by its appeal wants to recover the full loss from the Underwriters under the Direct Action Statute, plus interest for the additional year. The Primary Underwriter continues to join hands with its long time but now-sometime-ally, the Excess Underwriters (Lloyds), as both resist that awful prospect, but soon fall out as each takes the generous view that the other, not it, *American Fidelity & Casualty Company, Inc. v. St. Paul-Mercury Indemnity Company*, 5 Cir., 1957, 248 F.2d 509, should bear the loss of interest.

Red Letter and Direct Action

In Op [iii] we affirmed the earlier decisions of the District Court upholding the validity of the Red Letter Clause (see note 4, *supra)* and extending that dollar limitation to the Underwriters under the Direct Action Statute. Ordinarily that would be an end to it under the law of the case doctrine. *Lincoln National Life Insurance Company v. Roosth*, 5 Cir., 1962, 306 F.2d 110 (en banc), *cert. denied*, 1963, 372 U.S. 912, 83 S.Ct. 726, 9 L.Ed.2d 720. But we agree that the matter deserves another look-see in view of the long awaited answer to the *Jane Smith* 4-1-4 riddle[6] which came 15 years later in our celebrated *Nebel Towing*[7]

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[6]Maryland Casualty Co. v. Cushing, 1954, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806, 1954 A.M.C. 837.

[7]Olympic Towing Corp. v. Nebel Towing Co., Inc., 5 Cir., 1969, 419 F.2d 230, 1969 A.M.C. 1571, *reh. en banc denied*, 419 F.2d 238, *cert. denied*, Nebel Towing Co., Inc. v. Olympic Towing Corp., 1970, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396, ... A.M.C. ..... See Bue, Cushing Revealed — The Grisly Spectre is Precariously Defined As To Size And Shape, — July 1970 Insurance Counsel Journal 401.

Whatever else might be said by the protagonists about *Nebel Towing*, or what else it may portend, neither our holding therein that the statutory limitation of shipowner's liability is a defense personal to the assured shipowner nor the elucidation of it, transfers to a contractual limitation contained in the agreement which is the principal (if not whole) source of rights and obligations.

The problem of course is an amphibious one which is the result of mixing the Louisiana codal provision concerning *debtors in solido*[8] — as the Direct Action Statute (note 5, *supra*) expressly characterizes the liability — into a maritime case. In the context of a Direct Action situation the cases, as did *Nebel Towing*, turn on whether the particular defense is "personal to some of the other codebtors,"[9] And until rejected in *Nebel Towing*, none involved directly the affirmative provi-

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[8]"Art. 2098. Defenses available to debtors in solido

Art. 2098. A codebtor *in solido*, being sued by the creditor may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the codebtors.

He can not plead such exceptions as are merely personal to some of the other codebtors."

L.S.A. — C.C. Art. 2098 (1952).

See the following articles for a full explanation of the meaning of "*debtor in solido*": Comment, XXV Tulane Law Review 217; and Comment XIV Louisiana Law Review 828.

[9]Defenses which have heretofore been considered "personal" under Louisiana law, thereby precluding their assertion and utilization by a tortfeasor's insurer, include: infancy, LSA-R.S. 9:571, see Rouley v. State Farm Mutual Automobile Ins. Co., W.D. La., 1964, 235 S.Supp. 786; coverture, see Edwards v. Royal Indemnity Co., 1935, 182 La. 171, 161 So. 191 and Dumas v. United States Fidelity & Guaranty Co., 1961, 241 La. 1096, 134 So.2d 45; charitable immunity, see Lusk v. United States Fidelity & Guaranty Co., La.Ct.App., 1941, 199 So. 666; and governmental immunity, Brooks v. Bass, La.Ct. App., 1938, 184 So. 222. As succinctly stated in Simmons v. Clark, La.Ct. App., 1953, 64 So.2d 520: "[p]ersonal defenses are such as infancy, interdiction, coverture, lunacy, bankruptcy and the like." 64 So.2d at 523. In ITCO, E.D. La., 1965, 242 F.Supp. 950 was added those with a right to limit their liability. See also, *Nebel Towing*, *supra*, and *Alcoa v. Ferran*, *supra*, at p. 1.

sion of Art. 2098 (note 8, *supra*) extending to all co-debtors the defenses "resulting from the nature of the obligation."

Although we have found little in the way of Court decisions or the preferred legal literature of the Civil Law[10] to guide us through the sometime quaint codal language, we are of the clear view that the Red Letter Clause defense is not [i] personal to the Shiprepairer[11] and is [ii] one resulting from the nature of the obligation.

Obviously the defense is not "personal" to Shiprepairer, so the pivotal question is: what is the nature

[10]Most of the literature regarding defenses "resulting from the nature of the obligation" in Article 2098 speak in terms of defenses which derive from the non-existence of the obligation or from various types of nullity. See 25 XXV, Tulane Law Review (1951), comment, Solidary Obligations 217, 224. We have examined the material cited in notes 69, 70 and 71, and find nothing significant as bearing on our problem. The literature recognizes that frequently the "nature of the obligation" defense and defenses "as are common to all the codebtors" coalesce. But the "common" defense element of Article 2098 is not helpful here since this necessarily begs the question whether the Red Letter Clause is a defense available to all — Shiprepairer and its Underwriters. Nor have we found any substantiation in the literature or in Court decisions for Shipowner's argument that by the interplay of codal Articles 1764, 1841, 1903 (see Appellant's brief pages 5-6 and note 1), the "nature of the obligation" is an implied term of a contract since an expressed provision (the Red Letter Clause) is an "accidental stipulation".

[11]Citing the District Court on this point the Court in *Nebel Towing* said: "[T]he nature of a 'personal defense' under Louisiana law is explained in [the] excellent opinion in * * * [Op [ii] p. 831] * * * *. After pointing out a number of defenses which have been held to be 'personal' under Louisiana — * * * * [the court] stated:

> 'Amongst these apparently varied "personal" defenses, one common denominator is discernible — each person possessing a "personal" defense obtained that defense because the law granted it to all members of his class as a matter of public policy. The personal defense attaches to the status. Hence parents, children, husbands, wives, governmental units, charitable organizations, bankrupts, lunatics, Interdicts, vessel owners, and the like possess a defense denied their respective insurers.'" See Op [ii] p. 831.

of the transaction. The nature of the transaction was, of course, a ship repair contract which expressed rights and duties, but which — perhaps even more important — created the relationship out of which the law would impose implied duties, rights, and obligations. Typical would be the implied obligation (in the absence of contract terms) not to cause damage by negligence, and for amphibious work, the presence of the ubiquitous, awesome WWLP.[12] And if the "transaction" encompasses the litigation, it meets the test. For the action asserted both negligence and breach of WWLP.

Given the validity of the Red Letter Clause (Op [iii] pp. 55, 56), its effectiveness is proved by the result here — a ceiling of $300,000 on damages stated to have exceeded $1,000,000.[13] The clause was used for the express purpose of limiting the underlying obligation in the event of foreseeable occurrences, which would be in the nature of a tort or breach of the WWLP, in which damages could run into the millions.

The District Judge was correct in stating it this way:

"Here the size of the obligation was part of the obligation." (Op [ii] p. 831).

The Red Letter Clause is valid and extends to insurers under the Direct Action Statute.

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[12]Warranty of Workmanlike Performance. See Horace Delaneuville, Jr. v. O. Ditlev Simonsen, Jr., 5 Cir., 1971, ... F.2d ..... [No. 29233, January 25, 1971] at p. 2, n. 1, and cases therein cited.

[13]Notwithstanding the limitation of $300,000 imposed by the Red Letter Clause there is no substantial doubt that the actual damages inflicted on the ship amounted to $1,000,000. See Op [i] pp. 966, 973.

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[13]Notwithstanding the limitation of $300,000 imposed by the Red Letter Clause there is no substantial doubt that the actual damages inflicted on the ship amounted to $1,000,000. See Op [i] pp. 966, 973.

Red Letters and Interest

The Master and District Court awarded interest to Shipowner on the $300,000. The question now is whether that is consistent with the term "aggregate liability" as used in the Red Letter Clause (see note 4, *supra*).

We readily answer in the affirmative. At the outset the clause describes liabilities in terms of those to whom it might become liable as the vessel's owners, charterers, or underwriters. It is next stated therein that the "aggregate liability to all such parties" shall be limited to $300,000. There are thus both claims — in the sense of distinctive types of losses, e.g., to hull, to stores, to cargo — and persons to whom it might be liable, which could readily make the ceiling ineffective unless it is certain that all are to be lumped together so the ceiling would apply to them all.

Equally important, this was, in effect, an implied undertaking by Shiprepairer that, if it was, or became, liable for any such damage, it would have to pay up to the limit of $300,000. As with any other obligation — and in the Admiralty most torts — when the one cast fails to pay, then interest on the amount due, but withheld, is allowed as a means of making the other party whole. There is justification for that here since it took from 1956 to 1969 to get even the limited recovery. And lastly, this being a contract claiming immunity it is to be strictly construed. *Herd & Co. v. Krawill Machinery Corp.*, 1959, 359 U.S. 297, 304-305, 79 S.Ct. 766, 3 L.Ed.2d 820, 1959 A.M.C. 879.

Shiprepairer (and hence its Underwriters) are liable for interest on the $300,000.

Allies Part — Whose Move — Who Pays?

Comforted by the serene knowledge that the Red Letter ceiling has been maintained, Primary and Excess Underwriters now part company, with each turning on the other for the payment of interest. From a combination of factors we think Primary Underwriters have the better of it so we fix the liability on Excess Underwriters.

The case law in non-marine policies is generally consistent in disallowing interest in excess of the dollar policy limits unless the policy contains language which provides for interest.[14] We do not agree with the Master's reliance on *Maryland Casualty Co. v. Omaha Electric Light & Power Company*, 8 Cir., 1907, 157 F.2d 514 and *Tulare County Power Company v. Pacific Surety Company*, 1919, ... Cal. ....., 185 P. 399 for the holding that Primary Underwriters have a liability in excess of the dollar limit.

But we do not make this as a choice of law for general (or Louisiana) application. We do it in the context of this situation in which the insurance was a carefully dovetailed, integrated program in which each had significant interests at stake, often regardless of the ulti-

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[14]Primary Underwriters stresses these cases which so hold: Pacific Coast Casualty Company v. General Bonding & Casualty Company, 9 Cir., 1917, 240 F. 36; Maryland Casualty Company v. Omaha Electric Light & Power Company, 8 Cir., 1907, 157 F. 514; Tulare County Power Company v. Pacific Surety Company, 1919, ... Cal. ....., 185 P. 399; Davison v. Maryland Casualty Company, 1908, ... Mass. ..... , 83 N.E. 407; National & Providence Worsted Mills v. Frankfort Marine Accident, Etc. Company, 1907, ... R.I. ....., 66 A. 58; Munro v. Maryland Casualty Company, 1905, 96 N.Y.S. 705; Brewster v. Empire State Surety Co. of New York, 1911, 130 N.Y.S. 439; Saratoga Trap Rock Co. v. Standard Accident Insurance Co., 1911, 128 N.Y.S. 822.

mate outcome of a potential claim. Primary Underwriter had the first $300,000 less a franchise (deductible) of $500.[15] The excess cover was expressly based upon the named primary policy and subject to all its terms and conditions. It picked up liabilities in excess of $300,500.[16]

Contrary to the argument Excess Underwriter makes, which was successfully pressed on the Master, this was in no sense a situation where Primary Underwriter had the "use of this money" for 13 years. Both Underwriters were actively interested in the handling of this casualty loss, as witnessed by the vigorous arguments advanced orally and in briefs, both here and below, by these close collaborators as proctors for the Shiprepairer, without the slightest suggestion that there were differences between them. More than that, as the 15 year struggle in *Jane Smith* demonstrates, no one could have predicted with any assurance, until we ruled and the last bell from Washington tolled out denial of certiorari, whether the Red Letter Clause would survive or what would happen under the Louisiana Direct Action Statute. The baseless nature of the "money retained" theory is shown by contemplating

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[15]The policy provided:

> "3. The maximum liability of [the Primary Underwriter] on account of any one disaster or casualty shall not exceed: $300,000 [under Section 1A], $300,000 [under Section 1B]. 4. * * * [The] sum [of $500] shall be deducted from the amount payable hereunder * * *."

[16]The policy recited:

> "Subject to all terms and conditions as per underlying policy with the Marine Office of America * * * and only to pay the excess of $300,500 each and every accident, or if the underlying Underwriters are obligated to pay a larger sum under the terms of their coverage, as to liabilities chargeable to single accident, then to pay the excess of such larger sums plus $500."

what would have occurred had Primary Underwriter on its own and without consent of Excess Underwriters, paid into the registry its full $300,000 before liability had been adjudicated, or before the validity of the Red Letter Clause had been determined.

And to cap it all off, the insuring agreement (see note .16, *infra*) spells out how amounts in excess of policy limits are to be adjusted under the insurance program. It provides that "if the [Primary] Underwriters are obligated to pay a larger sum under the terms of their coverage, as to liabilities chargeable to a single accident, then [Excess Underwriters are] to pay the excess of such larger sums plus $500."

Obviously what was in mind was what has occurred here — a Court holding that despite the fixed ceiling of $300,000 the law requires payment of interest thereon. Indeed, affirming the Master's holding would automatically trigger this obligation, so the result is the same whether done on that basis or our approach which fixes it directly on Excess Underwriters.

Consequently the decree is reversed to put liability for interest on Excess Underwriters.[17]

When Does Interest Commence?

Shipowner's attack on the lower Court's holding that interest would commence from the date of judicial demand (October 1957) rather than from the date of casualty (October 1956) may be disposed of quickly.

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[17]There is no merit to Excess Underwriter's contention that Shipowner, in the formal "Certificate of Satisfaction" of judgment, released or waived its claim to the interest.

Although allowance of interest is ordinarily within the discretion of the Trial Court, it is equally true that for property damage "interest from the date of loss has long been allowed, of course, in admiralty for property loss". *National Airlines, Inc. v. Stiles*, 5 Cir., 1959, 268 F.2d 400, ... A.M.C. ..... This is the general rule prevailing in admirality. See, Petition of The City of New York, 2 Cir., 1964, 332 F.2d 1006. The Court therein stated:

> "It has long been held proper for admiralty courts fully to restore the injured party to his condition at the time of injury by allowing and fixing prejudgment interest from the date of the loss in proceedings involving property damage. * * *"

Here neither the Master nor District Judge gave any reason why this rule should not be followed. We might, of course, send this back for reconsideration, but since cases should at least fade away, if not die,[18] from our view we think the equities predominate in Shipowner's favor, especially as a permissible, slight amelioration of the Red Letter immunity, *Herd & Co. v. Krawill Machinery Corp., supra*, and we should so state without more delay. *Oil Screw Noah's Ark v. Bentley & Felton Corporation*, 5 Cir., 1963, 322 F.2d 3, at 10, 1964 A.M.C. 59, at 68.

In summary we give full application to *Nebel Towing* which remains undiminished in its binding force but hold that the defense of the Red Letter Clause is not

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[18]Bros., Incorporated v. W.E. Grace Manufacturing Company, 5 Cir., 1963, 320 F.2d 594.

personal to the Shiprepairer as it is one resulting from the nature of the obligation and consequently is available to the Underwriters. And specifically we affirm (i) extending the Red Letter Clause to the Underwriters, and (ii) the allowance of interest, but we reverse by holding (iii) that Excess, not Primary, Underwriters are to pay interest and (iv) interest is to commence on the date of the loss. We remand for computation.

AFFIRMED IN PART
REVERSED IN PART
and REMANDED.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 28944

D. C. Docket No. Adm. 3390 "B"

ALCOA STEAMSHIP COMPANY, INC.,
Plaintiff-Appellee Cross Appellant,

versus

CHARLES FERRAN & CO., INC AND GLENS FALLS INSURANCE COMPANY, ET AL.,

Defendants-Appellants Cross Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before BROWN, Chief Judge, GEWIN and THORNBERRY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court that the judgment of the said District Court in this cause be, the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that the costs of appeal be taxed equally against (1) Charles Ferran and Company, Inc. and the Glens Falls Insurance Company and (2) excess underwriters of Charles Ferran & Company, Inc.

April 26, 1971

Issued As Mandate:

APPENDIX C

Order of the Court of Appeals on Petition for Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28944

ALCOA STEAMSHIP COMPANY, INC.,
Plaintiff-Appellee Cross Appellant,

versus

CHARLES FERRAN & CO., INC. AND GLENS FALLS INSURANCE COMPANY, ET AL,
Defendants-Appellants Cross Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Apr. 26, 1971, 5 Cir., 1971, ... F.2d .....).

(June 23, 1971)

Before BROWN, Chief Judge, GEWIN and THORNBERRY, Circuit Judges.

PER CURIAM: The Petition for Rehearing on behalf of Alcoa Steamship Co., Inc. is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED. The Motion to Modify the Mandate on behalf of Alcoa Steamship Co., Inc. to increase the allowable interest from 5% to 7% is DENIED.

It is further ordered that the Petition for Rehearing on behalf of Charles Ferran & Co. and its Excess Underwriters be, and hereby is, DENIED.

APPENDIX D

Judgment of the District Court (Original)

ADMIRALTY

NO. 3390

SECTION "B"

ALCOA STEAMSHIP COMPANY, INC.

versus

CHARLES FERRAN AND COMPANY, INC., et al.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JUDGMENT

This action came on for hearing before the Court on the report of the Special Master, Richard B. Montgomery, Jr., for the determination of the amount due to the plaintiff, Alcoa Steamship Company, Inc., from the defendants, Charles Ferran and Company, Inc., The Fidelity and Casualty Company of New York, et al, as interest on the damages sustained by plaintiff, limited to

$300,000.00 as a result of the fire on its vessel, the SS ALCOA CORSAIR, on October 6, 1956. As noted by the Special Master, the damages in the principal sum of $300,000.00 as limited by the "Red Letter" clause under which the repairs to the vessel were performed were paid to the plaintiff by Charles Ferran and Company, Inc. and the Fidelity and Casualty Company of New York on May 6, 1969, reserving to the plaintiff its right to interest and costs. The issures having been duly heard and a decision having been duly rendered and all objections to the report having been considered by the Court:

IT IS ORDERED AND ADJUDGED that the report of Richard B. Montgomery, Jr., Special Master, be, and the same is hereby accepted and confirmed by the Court and adopted as its findings and reasons herein; and;

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Alcoa Steamship Co., Inc., recover of the defendants, Charles Ferran and Company, Inc. and the Fidelity and Casualty Company of New York, its interest at the rate of five (5%) per cent per annum on its damages, limited as aforesaid to $300,000.00 from the date of judicial demand, October 3, 1957, to May 6, 1969, a period of eleven (11) years, seven (7) months and three (3) days, the sum of $173,873.27, with interest thereon at the rate of five (5%) per cent per annum from the date of this judgment, pursuant to 28 USCA 1961, and its costs.

IT IS FURTHER ORDERED, that a ruling on the determination of the fee of the Special Master, if necessary, is hereby RESERVED.

Dated at New Orleans, Louisiana this 24 day of November, 1969.

(Signed) Frederick J. R. Heebe
UNITED STATES DISTRICT JUDGE

Benjamin W. Yancey, Esq.

Edward S. Bagley, Esq.

George A. Frilot, III, Esq.

George B. Matthews, Esq.

Paul A. Nalty, Esq.

Leon Sarpy, Esq.

Richard B. Montgomery, Jr., Esq.

APPENDIX D

Judgment of the District Court (Amended)

ADMIRALTY
NO. 3390
SECTION "B"

ALCOA STEAMSHIP COMPANY, INC.

versus

CHARLES FERRAN AND COMPANY, INC., et al.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

AMENDED JUDGMENT

It appearing to the Court that in the judgment of November 24, 1969, the Fidelity and Casualty Company of New York was erroneously named, and the proper party to be cast in judgment is Glens Falls Insurance Company;

IT IS THE ORDER OF THE COURT that the judgment entered in the above cause on November 24, 1969,

be, and the same is hereby, AMENDED to read as follows:

"This action came on for hearing before the Court on the report of the Special Master, Richard B. Montgomery, Jr., for the determination of the amount due to the plaintiff, Alcoa Steamship Company, Inc., from the defendants, Charles Ferran and Company, Inc., Glens Falls Insurance Company, et al, as interest on the damages sustained by plaintiff, limited to $300,000.00, as a result of the fire on its vessel, the SS ALCOA CORSAIR, on October 6, 1956. As noted by the Special Master, the damages in the principal sum of $300,000.00 as limited by the "Red Letter" clause under which the repairs to the vessel were performed were paid to the plaintiff by Charles Ferran and Company, Inc. and Glens Falls Insurance Company on May 6, 1969, reserving to the palintiff its right to interest and costs. The issues having been duly heard and a decision having been duly rendered and all objections to the report having been considered by the Court:

"IT IS ORDERED AND ADJUDGED that the report of Richard B. Montgomery, Jr., Special Master, be, and the same is hereby, ACCEPTED and CONFIRMED by the Court and ADOPTED as its findings and reasons herein; and

"IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Alcoa Steamship Company, Inc., recover of the defendants, Charles Ferran and Company, Inc., and Glens Falls Insurance Company, its interest at the rate of five (5%) per cent per annum on its damages, limited as aforesaid to $300,000.00 from the

date of judicial demand, October 3, 1957, to May 6, 1969, a period of eleven (11) years, seven (7) months, and three (3) days, the sum of $173,873.27, with interest thereon at the rate of five (5%) per cent per annum from the date of this judgment, pursuant to 28 USCA 1961, and its costs.

"IT IS FURTHER ORDERED that a ruling on the determination of the fee of the Special Master, if necessary, is hereby, RESERVED."

(Signed) Frederick J. R. Heebe
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
December 1, 1969

APPENDIX E

Findings by the Special Master,

Richard B. Montgomery, Jr.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

IN ADMIRALTY NO. 3390

SECTION "B"

ALCOA STEAMSHIP COMPANY, INC.

versus

CHARLES FERRAN & COMPANY, INC., ET AL

SPECIAL MASTER'S REPORT

The report of Richard B. Montgomery, Jr., Special Master in the above captioned and numbered matter, to whom this cause stands referred for the purpose of determining whether or not Alcoa Steamship Co., Inc. was entitled to recover interest and if it is entitled to recover interest the amount thereof and the period for which it should be allowed. The matter was further referred for the purpose of determining whether or not the interest should be paid by the Marine Office of America, the primary insurer, or whether it should be paid by Lloyds.

The original record has been considered by the master. A hearing was had before me to allow each side to

present its case and to offer any additional evidence, letters or documents which were pertinent. A preliminary finding was made which was submitted to the attorneys for the parties and another hearing was had with additional briefs.

Based upon the hearings, my findings are as follows:

1. The Court in its judgment found that the plaintiff was entitled to interest and the judgment is now final.

2. The Red Letter Clause contained in the contract between Alcoa Steamship Co., Inc. and Charles Ferran & Company, Inc. does not exclude Alcoa Steamship Co., Inc.'s right to be awarded interest on the judgment of $300,000.00.

3. The primary insurer, Marine Office of America, should bear the responsibility for the payment of the interest.

4. The facts do not support any defense of release from liability for interest.

5. The question of delay is decided in favor of Alcoa Steamship Company, Inc. as there is no evidence that any delay in the final determination of the case can be laid at the door of Alcoa Steamship Company, Inc.

6. The determination as to interest is discretionary, and the master believes that this is a case where interest should be allowed.

MASTER'S REASONS FOR THESE FINDINGS

It is my opinion, after reading the opinion of Judge Ellis and the pleadings leading up to the order of Judge Rubin, that the court did decide the question of whether or not interest was due to the Alcoa Steamship Company, Inc. However, when the language of the judgment signed by Judge Ellis on March 3, 1966 is considered, it would seem that he decided this question. The language is as follows:

> "ORDERED, ADJUDGED AND DECREED that the libelant herein, Alcoa Steamship Company, Inc., recover of and from Charles Ferran & Co., Inc., Glens Falls Indemnity Company, Underwriters at Lloyd's London, Andrew Weir Insurance Co., Ltd., Fine Art & General Insurance Co., Ltd., National Provincial Insurance Co., Ltd., Orion Insurance Company, Ltd., English & American Insurance Co., Ltd., "M", and Economic Insurance Company, Ltd. "M" a/c, respondents, jointly and severally, the damages sustained by Alcoa Steamship Company, Inc. in consequence of the matters referred to in the libel, limited to the sum of $300,000.00 pursuant to the limitation of liability provided by the "red letter" clause of the contract between the parties as referred to in the Court's opinion, with interest and costs;".

This states that Alcoa Steamship Company, Inc. shall recover the damages with interest and costs. He limits the recovery of damages to the sum of $300,000.00, but does not include interest in the limitation. The judgment would have read "damages, interest and costs limited to the sum of $300,000.00" if he had so intended.

I also have decided that the "red letter" clause does

not exclude the right to interest; that, as a matter of fact, if one accepts the decision cited by Lemle & Kelleher, one comes to the conclusion that if this is considered similar to a limitation of liability proceeding, one should find then that interest is applicable. In re Harris, et als, 57 F. 243. See also the language in the GEORGE W. ROBY, 111 F.R., at page 622:

> "Where the stipulators defend the suit it is not unusual to charge them with interest from the date of the filing of bond upon the ground that they are responsible for the delays instant to the defense made. THE MAGGIE, 33 F. 595; JUANITA, 95 U.S. 612; MAGGIE J. SMITH, 123 U.S. 356, 8 S. Ct. 139."

Also, it is the general rule of law in regard to interest where limitations of the policy are pleaded. See Section 1591, Am.Jusp., Vol. 29-A. It is also my opinion that the same rule of law applies to the limitation of the policy under the general theory that interest is payable as damages for loss of use of the money.

The reason for making a determination that the Marine Office of America should bear the responsibility is that it, as primary insurer, had the use of the money during the period of limitation. There is some conflict of opinion as to this question, but I am basing my decision on Maryland Casualty Company v. Omaha Electric Light and Power Co., CCA 8 (1907), 157 F. 514. In this case the Court said:

> "The argument of plaintiff's counsel that the defendant, by exercising its right of appeal, and by superseding the execution of the judgment pending that appeal, caused the accumulation of interest in question, and thereby created an

additional charge against the plaintiff for which it should be held responsible as a loss to the plaintiff, is more specious than sound. The fallacy rests in a failure to recognize the advantage which the appeal gave the plaintiff.

* * * The value of the use is equal to the accrued interest, that being only a consideration paid for the use of money or for forbearance in demanding it when due. Accordingly the assured lost nothing by the delay occasioned by the appeal or by paying the interest which accumulated pending the appeal. The assured stood after paying the interest exactly as it would have stood if it had paid the judgment of $5,000 on January 3, 1902, when originally rendered. Nothing was lost by the appeal, as the interest ultimately paid was neutralized by the use enjoyment of the money before that time.

"Numerous authorities have been called to our attention as sustaining the different contentions of the parties. Defendant relies on Munro v. Maryland Casualty Co., 48 Misc. Rep. 705, 96 N.Y. Supp. 705, Henderson v. Maryland Casualty Co., 29 Pa. Super. Ct. 398, Frye v. Bath, Gas & Electric Co., 97 Me. 341, 54 Atl. 395, 59 L.R.A. 444, 94 Am. St. Rep. 500, Travelers' Ins Co. v. Moses, 63 N.J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663, and other cases. Plaintiff relies on Rumford Falls Paper Co. v. Fidelity & Casualty Co., 92 M.E. 574, 43 Atl. 503, Allen v. Aetna Life Ins. Co., 76 C.C.A. 265, 145 Fed. 881, 7 L.R.A. (N.S.) 958, Cudahy Packing Co. v. New Amsterdam Casualty Co. (C.C.) 132 Fed. 623, Southern Ry. News Co. v. Fidelity & Casualty Co., 83 S.W. 620, 26 Ky. Law Rep. 1217, Travelers Ins. Co. v. Henderson Cotton Mills, 85 S.W. 1090, 27 Ky. Law Rep. 653, and other cases dealing with the general

> subject of indemnity, of more or less pertinency to the case in hand. The Rumford Paper Company and Allen cases, supra, deal chiefly with the contention whether the indemnitor, by availing itself of the right to defend the employees' action, subjected itself to liability for any amount which might be recovered in the action beyond the limit fixed in the policy. That contention was held untenable, and very little, if any, consideration was given to any other question of law. In the Cudahy Packing Company case the main contention was whether the indemnitor in an action similar to the present was entitled to a deduction from the limit of its liability of amounts expended in making a defense to the employees' action. It was held that it was entitled to no such deduction. Very little countenance, if any, was given in that case to the present contention of the plaintiff.
>
> "All the cases have been carefully considered, and the conclusions reached are believed to be in harmony with the best reason and authority."

This is also the ruling in the case of Tulane County Power Co. v. Pacific Surety Co,, 185 P. 399.

Although the attorneys for the primary insurer cite the above cases as being favorable to their position that the excess insurer should pay the interest, I am unable to agree with their contention as to what the case holds. In this case the plaintiff would have had to pay the judgment and did not do so by reason of the appeal which was taken. the court held that since the plaintiff, the insured, had the use of the money during that period that as between the insured and the insurer the insured could not recover interest from the insured because it had had the use of the money. In other words, this case

would be authority that Charles Ferran & Company, Inc. could not recover interest from its insurer. However, the question here is is the interest due to a third party payable by the primary or the excess insurer. The answer is covered by the language on page 405 of the opinion in the case of Tulane County Power Co. vs. Pacific Surety Co., supra. The court there cites the very language that has been cited previously from Maryland Casualty Co. v. Omaha, supra, as supporting the master's contention that interest should be paid by the primary insurer.

Further, a reading of the exhibits, the letters and other documents submitted failed to prove that there was any undue delay in the trail of this case caused by the libellants or for which libellants can in any way be held responsible.

The defense of release cannot be upheld for the reason that there is no evidence in the record that any release was given when the payment of the $300,000.00 was made by the Marine Office of America. It is my opinion that this was a payment made solely for the purpose of cutting off future interest and the documents accompanying the payment were an admission that the amount was owed rather than was a settlement of a disputed claim.

The question of interest is discretionary in matters which are not based upon the law of the state but the recent cases, namely, Louisiana and Arkansas Railroad v. Export Drum Co., 359 F. 2d 311; Gardner v. National Bulk Carriers, 221 F. Supp. 243, affirmed 333 F. 2d 676, places the burden squarely upon the master to make a decision using his best discretion.

See also Crown Industries v. Boyerton, 300 F. 2d 809; Samicorp v. Rivadeluna, 277 F. Supp. 943; Collier v. Granger, 258 F. Supp. 717. This is a case in which the amount of damages which the libellant could recover was more or less ascertainable by calculation. The real question at issue in this case was not whether or not damages were owed but whether or not the "red letter" clause limited the amount of damages and whether or not there was a dimunition of damages. The interest should run from October 3, 1957, and the rate of interest should be five (5%) percent.

Respectfully submitted,

(Signed) RICHARD B. MONTGOMERY, JR.

RICHARD B. MONTGOMERY, JR.,
806 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

SPECIAL MASTER

APPENDIX F

Statutes Involved

28 U.S.C.A. 1961

§ 1961. Interest

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law. June 25, 1948, c. 646, 62 Stat. 957.

Louisiana Civil Code of 1970, Article 1935

Art. 1935. Interest as damages for non-payment of money

Art. 1935. The damages due for delay in the performance of an obligation to pay money are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more.

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AUG 4 1971
ROBERT SEAVER, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-91

UNDERWRITERS AT LLOYDS LONDON,
ANDREW WEIR INSURANCE CO., LTD.,
FINE ART & GENERAL INSURANCE CO., LTD.,
NATIONAL PROVINCIAL INSURANCE CO., LTD.,
ORION INSURANCE COMPANY, LTD.,
ENGLISH & AMERICAN INSURANCE CO., LTD.,
"M", and ECONOMIC INSURANCE COMPANY,
LTD., "M" a/c,

Petitioners

versus

ALCOA STEAMSHIP COMPANY, INC., ET AL.

Respondent

OPPOSITION OF CHARLES FERRAN & CO., INC. and GLENS FALLS INSURANCE COMPANY TO THE PETITION FOR A WRIT OF CERTIORARI

GEORGE B. MATTHEWS
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MATTHEWS & SCHUMACHER

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IN THE
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UNDERWRITERS AT LLOYDS LONDON,
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Now come Charles Ferran Co., Inc. and Glens Falls Insurance Company, respondents, and oppose the granting of a writ of certiorari herein for the reasons set forth below.

QUESTION PRESENTED

Respondents disagree with the "Questions Presented" in the petition. The only issue involved is the proper interpretation of a primary and an excess liability insurance policy. No substantial questions of law are presented for review.

STATEMENT OF THE CASE

This case arose out of a fire, which occurred on S/S ALCOA CORSAIR while she was under repair by Charles Ferran Co., Inc. (Ferran). Alcoa Steamship Company (Alcoa) as owner of the ALCOA CORSAIR brought suit against Ferran and its primary (Glens Falls Insurance Company) and excess (London) ship repairer's legal liability underwriters to recover damages resulting from the fire. Damages were claimed to be in excess of $1,000,000. In two opinions (242 F. Supp. 292 and 251 F. Supp. 823) the District Court found Ferran to have been negligent in starting the fire, held the "Red Letter Clause" in the repair-contract between Alcoa and Ferran (which limited Ferran's liability to $300,000) to be valid, and referred the determination of the damages to a Special Master. An appeal followed to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the District Court (383 F. 2d 46). An application by Alcoa for a writ on the issue as to the validity of the Red Letter Clause was denied.

Glens Falls Insurance Company had issued the policy of ship repairer's legal liability insurance to Ferran in the amount of $300,000 and London underwriters, petitioners here, had issued excess insurance on the same risks in an amount sufficient to cover Alcoa's claim.

Following the denial of Alcoa's application for a writ of certiorari and during hearings conducted by the Master, Glens Falls paid the limits of its policy, namely $300,000, which was the same amount as the Red Letter Clause limitation. After further hearings, the Master issued a report holding that the Red Letter Clause did not preclude recovery of interest on the maximum amount re-

coverable, and that such interest should be paid by Ferran and/or its primary underwriters. The report was adopted by the District Court. A second appeal then followed. The Court of Appeals held, first, that despite the limitation of the Red Letter Clause, Ferran was liable for interest in addition to $300,000, and, insofar as here pertinent, that under the terms of the primary and excess policies such interest should be paid by Excess underwriters. Its opinion is not yet reported, but is reproduced as Appendix A to the petition.

ARGUMENT

We have no quarrel with petitioners' position that the allowance of interest in admiralty is discretionary, but that is not the issue involved here. The District Court and the Court of Appeals both exercised their discretion to allow interest against Ferran. The question is — which of Ferran's underwriters, primary or excess, should pay the interest.

Possibly the situation is confused by the fact that both primary and excess underwriters were sued under the provisions of Louisiana Direct Action Statute (22 La. R. S. 655). Despite this statute, the relationship of the parties remains the same. There is no question that Ferran is responsible for interest under the terms of the existing judgment, and there is no question that one of Ferran's underwriters is responsible for Ferran's obligation. The issue then becomes one of policy or contract construction as between primary and excess underwriters. This issue is fully covered in the opinion of the Court of Appeals and was, we submit, correctly decided.

The application for a writ herein does not involve

any substantial federal questions or any constitutional issues despite petitioners' attempt to frame the "QUESTIONS PRESENTED" in such guise, nor does the application involve any of the considerations set forth in Rule 19 of this Court's rules. As mentioned above the issue is a narrow one of policy construction which was adequately and properly dealt with by the Court of Appeals and there is no reason for this Court to disturb this judgment.

Respectfully submitted,

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New Orleans, Louisiana 70112
(525-1241)

LEMLE,KELLEHER, KOHLMEYER,
MATTHEWS & SCHUMACHER
Of Counsel

CERTIFICATE OF SERVICE

I do hereby certify that I have on this day of , 1971, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.